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Supreme Court, U.S.
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No. 10-482

IN THE
Supreme Court of the United States

IN THE MATTER OF VELOCITA WORLDWIDE LOGISTICS, INC.,
Debtor.

DANIEL SHERMAN,
Petitioner,
v.
WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, AND PATRICK STRAYER
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals decided this bankruptcy appeal by resolving on policy grounds what it deemed a question of first impression under Texas law, without certifying that question to the Texas Supreme Court. In doing so, the court disregarded two Texas Supreme Court decisions from the 1890's, apparently deeming them too old to be instructive. The question presented is:

1. Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where—

- the question presented is important to the state's jurisprudence,
- there is authority—old but not overruled—from the state's supreme court resolving the question contrary to the federal court's resolution of it,
- the question is difficult enough that the three federal courts to address it all resolve it on different theories and grounds, and
- the federal court decides the issue on policy grounds.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Sherman, bankruptcy trustee in *In re Velocita Worldwide Logistics, Inc.* Respondents are William LaMothe, Rajan Sobhani, Chris Brack, Daniel Estrada, Scott Studebaker, James Michael Walsh, Brandon Robinson, and Patrick Stryer, who were defendants in the trustee's adversary action in the bankruptcy court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Sherman respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-8a) is reported at 608 F.3d 212. The order of the court of appeals denying rehearing (App., *infra*, at 22a) is not reported. The district court's judgment (App., *infra*, at 9a) and opinion (App., *infra*, 10a-15a) are unreported, as is the bankruptcy court's order (App., *infra*, at 16a-21a).

JURISDICTION

The Fifth Circuit filed its opinion on June 2, 2010, and denied a timely petition for rehearing on July 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 58.1 of the Texas Rules of Appellate Procedure provides that:

> The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

STATEMENT OF THE CASE

This case presents an optimal vehicle for this Court to refine its instruction on when federal courts should certify state-law questions in non-diversity cases not involving constitutional challenges. The case is ideal because of its unique and narrow facts, which would permit this Court to provide much-needed guidance on certification while preserving the broad grant of discretion enunciated in earlier cases.

If left undisturbed, the Fifth Circuit's opinion will encourage federal courts to resolve difficult and important state-law questions—even in non-diversity cases—on policy grounds, substituting their own policy analysis for that of the state's highest court and upsetting the delicate balance between the national and state judiciaries envisioned by our federal system. That imbalance is exacerbated in this case by the existence of old but never-overruled precedent seeming to contradict the circuit court's decision.

This case arose from a settlement agreement entered as a final judgment. That agreement required a company and ten individuals to pay, "jointly and individually," the sum of $1.85 million. The question presented was whether the company, having paid the entire amount, could pursue the individuals for their *pro rata* shares of the obligation.

1. ***The Underlying Litigation.*** William LaMothe founded a freight-forwarding company and sold it to a predecessor of Exel Global Logistics. ROA

at 48. Mr. LaMothe and several of his employees signed five-year employment agreements with Exel. ROA at 48. Just before expiration of those agreements, Mr. LaMothe formed a new company, which eventually became Velocita Worldwide Logistics. ROA at 48. When the five-year period ended, Mr. Lamothe and his employees left Exel to work for Velocita—now an Exel competitor ostensibly owned and operated by Mr. LaMothe's wife. ROA at 48.

Exel sued Velocita and ten of its employees, all of them former Exel employees (eight of whom are the respondents in this case). 2 BR at 0091. The parties settled the litigation, executing an "Agreed Final Judgment and Permanent Injunction" as their settlement agreement. 2 BR at 0237-0275. That agreement required Velocita to cease operations and imposed a host of other obligations including numerous injunctions against the individual defendants. BR-2 at 0237-0275. The agreement also obligated Velocita and the individual defendants to pay Exel the sum of $1.85 million:

> Defendants Velocita, Lamothe, Sobhani, Brack, Estrada, Studebaker, Alexander, Walsh, Mok, Robinson and Strayer, jointly and individually, shall be and are hereby ordered to pay to Excel, its successors and assigns, the amount of $1,850,000.00 . . . .

2 BR at 0255.

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[1] The Record on Appeal is referenced as ROA, while the Bankruptcy Record is referenced as BR.

Despite their individual liability, none of the individual defendants paid a single cent of the settlement—instead, Velocita paid the entire $1.85 million. 2 BR at 0135-0136. Velocita raised these funds by selling its equipment assets and by obtaining a $1 million loan—secured by the company's receivables—from another LaMothe entity. 2 BR at 0125-0126, 0130-0131. Velocita then collected its receivables and repaid the LaMothe loan, making its last payment on the final day of the company's fiscal operations. 2 BR at 0126. Nine days after expiration of the one-year preference period on the LaMothe loan payment, and facing numerous unpaid creditors, Velocita sought bankruptcy protection.

2. ***District Court Proceedings.*** The bankruptcy trustee, Daniel Sherman, filed an adversary proceeding to recover the individuals' *pro rata* shares of the settlement payment. Both parties sought summary judgment. The bankruptcy court granted summary judgment to the defendants based on the Texas Supreme Court's decision in *Beech Aircraft Corp.* v. *Jinkins*, 739 S.W.2d 19 (Tex. 1987), denying any right of contribution against a non-settling joint tortfeasor. App., *infra*, at 16a-21a; 1 BR at 0003-0006.

The district court affirmed that decision, but on different grounds, holding that the parties' failure to include an express contribution clause in their settlement agreement precluded any right to contribution based both on legal principles and public policy favoring settlement of litigation. App., *infra*, at 10a-15a; ROA at 101-105.

3. ***Fifth Circuit Proceedings.*** On appeal, Mr. Sherman's brief relied principally on two Texas Supreme Court cases from the 1890's establishing an implied right of contribution among co-obligors on a contract. Mr. Sherman did not seek certification at the briefing stage because he believed those cases governed the dispositive state-law issue.

During oral argument, one of the circuit judges almost immediately interrupted Mr. Sherman's counsel and expressed the opinion that the Texas Supreme Court's decisions on the matter simply were too old. Another circuit judge inquired about certification to the Texas Supreme Court.[2]

In its opinion, the court of appeals characterized the question as one of first impression in Texas, stating that "[t]his appeal asks us to consider whether Texas law would imply a right of contribution for a co-obligor of a settlement agreement that paid more than its proportionate share of the settlement." App., *infra*, at 3a. The court of appeals acknowledged Mr. Sherman's reliance on the two cases, describing them as "two century-old Texas cases that recognize an implied right to contribution." *Ibid.* But the court did not otherwise discuss or distinguish those cases. Neither did the court rely on—or even mention—the bankruptcy court's joint tortfeasor analysis or the district court's express contribution clause analysis. Instead, the court of appeals simply concluded that public policy weighs against permitting an implied right of

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[2] The oral argument is available on the "Oral Argument Recordings" portion of the Fifth Circuit's website.

contribution from a settlement agreement. App., *infra*, at 7a.

After receiving the opinion, Mr. Sherman filed a petition for rehearing urging the court of appeals to reconsider its refusal to credit the state-court decisions. Mr. Sherman also asked that if the court of appeals would not credit those decisions, and continued to view the question as one of first impression turning on policy grounds, that it certify the question to the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

This case demonstrates the need for further guidance on certification in non-diversity, non-*Pullman* cases. In this case, three federal courts attempted to decide what they considered an unsettled but important question of Texas law; though they all reached the same result, each of them relied on a different legal theory to do so. There are three reasons this Court should grant the writ of certiorari in this case.

First, the circuit court's failure to certify the dispositive question in this case conflicts with this Court's decision in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), vacating a circuit court's decision and remanding for certification under similar circumstances.

Second, failure to certify this case cannot be squared with traditional notions of judicial federalism. "When federal courts decide unsettled questions of state law in cases involving policy judgments with widespread impact, the intrusion on state sovereignty is at its greatest." *See* Jessica

Smith, *Avoiding Prognostication and Promoting Federalism: The Need for An Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N. CAR. L. REV. 2123, 2135 (1999) (citation omitted).

Finally, the court of appeals incorrectly substituted its policy judgment for valid state-law precedent. Texas law permits the contribution claim brought by Mr. Sherman.

I. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY THIS CASE CONFLICTS WITH THIS COURT'S REASONING IN *LEHMAN BROS.* AND VIOLATES BASIC TENETS OF FEDERALISM.

Most of this Court's certification decisions concern abstention under *R. R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496 (1941). These cases usually involve constitutional challenges to state statutes. *See, e.g., Belotti* v. *Baird*, 428 U.S. 132, 150-53 (1976); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79 (1997). The use of certification is relatively clear under *Pullman* abstention, where federal courts certify a question only where the challenged statute is fairly subject to a narrowing interpretation which would render unnecessary or substantially modify the federal constitutional question. *See Houston* v. *Hill*, 482 U.S. 451, 468-471 (1987) (*citing Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965) and *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 236 (1984)).

This case presents certification in a different context, a non-diversity case not involving *Pullman* abstention. In this context, certification trenches

upon the framework of our federal system, and its delicate balance between national and state judicial power.

The circuit court's decision in this case is difficult to reconcile with this Court's decision in *Lehman Bros.*, which involved a diversity lawsuit in federal court in New York, in which liability turned on an unsettled question of Florida law. The district court resolved that question based on Florida intermediate appellate decisions and rendered judgment. The court of appeals reversed, finding no Florida cases decisive and applying the law of other states to predict the likely outcome in Florida. *Ibid* at 388-89. This Court vacated the circuit court's decision and remanded the case for consideration of certification to the Florida Supreme Court.

This Court relied on three factors in suggesting that certification was warranted: (1) the novelty of the question, (2) the "great unsettlement" of state law concerning it, and (3) the distance of the New York federal court from Florida. *Ibid* at 391. Two of those three factors are present in this case, along with a host of others not presented by *Lehman Bros.*

The question in this case—whether a co-obligor to a settlement agreement who pays an obligation under that agreement has an implied right to contribution from non-paying co-obligors—is a novel one under Texas law. Indeed, the respondents argued with vigor that Texas courts never have confronted it. And neither the parties nor the court of appeals cited any case from any other jurisdiction considering it. Despite Mr. Sherman's

position that valid Texas precedent governs the matter, the three federal courts to examine this issue relied on three different theories in resolving it. It would appear, then, that the matter is neither clear nor easily determined by federal judges. After all, the court of appeals decided that the bankruptcy and district court judge applied the wrong law to the case—and both of them are Texas judges. This raises the risk that even the circuit court's interpretation of Texas law may be wrong.

Certification reduces the risk of this type of erroneous guess by a federal court concerning state-law issues. These erroneous guesses inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court, and skew the decisions of people and businesses who rely on them. Moreover, as this Court has pointed out, "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is . . . supplanted by a controlling decision of a state court." *Pullman Co.*, 312 U.S. at 500. In a case like this, certification is better than "the sometimes scholastic, always uncertain exploration into what the local Judges would say they would say the local law is." *Martinez* v. *Rodriguez*, 410 F.2d 729, 730-31 (5th Cir. 1969).

The court of appeals viewed its task as predicting "whether Texas law would imply" a contribution right under a settlement agreement. Attempting to predict a state court's decision in any case is a difficult task. As one court summarized this frustrating process of judicial soothsaying: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about

which neither has thought." *Nolan* v. *Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *rev'd*, 365 U.S. 293 (1961).

In contrast, if the state's highest court hears the question, its response will be definitive. Because that court is the final arbiter of state law, its decision always will be correct. And the state court decision will create certainty, which benefits future parties (who know their rights) and the court system as a whole (by reducing litigation). Finally, the Texas certification rule permits the Texas Supreme Court to decline certification; the court might well do so in this case based upon its previous decisions concerning contribution. And that decision would also provide a definitive answer.

Of course, this case differs from *Lehman Bros.* because the Fifth Circuit regularly reviews Texas law. But this case also presents other factors weighing in favor of certification and not present in *Lehman Bros.* The most important among these is the policy-laden analysis underlying the decision by the court of appeals. Without certification in this situation, federal courts "are forced to make important state policy, in contravention of basic federalism principles." *Hakimoglu* v. *Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting). In contrast, certification helps "build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391.

Certification also fosters comity by affording state judges control over the content of state law. Resolving unsettled issues of state law requires value-laden policymaking; state judges, immersed in

their state's social and legal milieu and accountable to its citizens, should decide those issues. That the state should have the opportunity to declare and control the development of state law, particularly when important state policies hang in the balance, seems self-evident in our federal system. As one state supreme court has explained:

> [A]part from the most fundamental principle of "our federalism"—that the state court of last resort is alone the supreme arbiter of the substantive content of the law of the State—a concern to promote federal-state comity would counsel that, whenever reasonably possible, the state court of last resort should be given opportunity to decide state law issues on which there are no state precedents which are controlling or clearly indicative of the developmental sequence of state law.

White v. *Edgar*, 320 A.2d 668, 675 (Me. 1974) (footnote and citation omitted).

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO REFINE THIS COURT'S INSTRUCTIONS ON CERTIFICATION WITHOUT LIMITING THE BROAD DISCRETION ENUNCIATED BY PRIOR DECISIONS.

Even in the *Pullman* abstention arena, the circuit courts have struggled to enunciate consistent standards for certification. According to one court of appeals, "[s]ubstantial doubt about a question of

state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." *Jones* v. *Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003); *see also Stevens* v. *Battelle Memorial Institute*, 488 F.3d 896, (11th Cir. 2007). But most circuit courts apply a fairly rigorous three-part test before certifying a case. *See, e.g., McRedmond* v. *Wilson*, 533 F.2d 757, 761 (2d Cir. 1976).

Given the uncertainty surrounding certification—underscored by the circuit court's failure to certify this case despite its similarity to *Lehman Bros.*—additional guidance from this Court would be helpful both to judges and litigants. At the same time, this Court has made clear its reluctance to make any decision infringing on the broad discretion afforded to lower courts in evaluating the advisability of certification. *See Lehman Bros.*, 416 U.S. at 392 (Rehnquist, J., concurring).

This case presents an ideal vehicle to refine this Court's guidance on certification. The unique and extraordinary circumstances in this case mean the decision in this case will *inform*—rather than *inhibit*—the exercise of discretion by federal judges in deciding certification requests. Those unique and extraordinary circumstances include state law so unclear that three federal courts applied three different theories in attempting to ascertain it, a circuit court opinion based entirely on policy grounds, an issue of importance to the state's jurisprudence, and—perhaps most important—the absence of any significant issue of federal law.

As a result, this Court can further illustrate for lower federal courts the types of factors supporting certification in a limited decision that will preserve the broad scope of discretion previously established.

III. THE FIFTH CIRCUIT INCORRECTLY APPLIED TEXAS LAW AND POLICY CONCERNS IN REJECTING MR. SHERMAN'S CLAIM.

The opinion by the court of appeals appears to grant that the cases cited by Mr. Sherman established a right of contribution among co-obligors, but states that Texas courts "have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts" (Opinion at 4). But in *Mateer* v. *Cockrill*, 45 S.W. 751 (Tex. Civ. App. 1898), the court applied the right even though it explicitly stated the obligations at issue were not the same as those in a note or guaranty:

> We think the duties and liabilities of these guarantors, as between themselves, are not in all respects the same as those existing between the guarantors of a note or bond for payment of definite sums of money upon default by the payor or obligor.

Ibid at 755. So almost from the beginning, the right extended beyond the payment of money and applied to promises to "pay a sum of money to, ***or to do something for***" another party. *Faires* v. *Cockrill*, 31 S.W. 190, 193 (Tex. 1895) (emphasis added).

This Texas rule comports with the general American doctrine that "[w]here several obligors are jointly or jointly and severally bound as principals upon an obligation founded in contract, one who has rightfully paid more than his share of the joint obligation may recover contribution from his cocontractors." 18 AM. JUR. 2D *Contribution* § 31 (1985) (citations omitted). And this is true "when the parties are under a common burden, obligation, or liability, regardless of whether such common burden is one assumed by the parties through contract, one devolving upon them as co-owners of property, one imposed by statute, or one which the law imposes equally on the parties in certain cases . . . ." *Ibid* § 10 (citations omitted).

In essence, Texas treats contractual co-obligors as sureties for each other. In practical effect, each co-obligor is a principal as to his share, and a surety as to the others' shares. Respondents and Velocita entered into a single promissory sentence with respect to payment of the settlement funds, and each of them was a principal as to his own share and a surety as to the others' shares.

The court of appeals disregarded these Texas cases and decided the case on policy grounds. Even if the circuit court's policy analysis is correct—and it is not—it would not constitute a basis for ignoring established Texas law. The court of appeals was tasked with ascertaining what the law is in Texas, not what it ought to be based on policy concerns. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 487 (1941).

Enforcing the settlement agreement by holding respondents accountable for their respective portions of the common liability will not discourage settlements. Any small number of settlements deterred by this case would be offset by the numerous defendants more likely to enter into joint and several settlements knowing they can enforce those settlements against co-obligors who refuse to pay their shares.

Even for parties who may be skittish as a result of this case, the most likely result will not be to discourage settlements but instead to promote better-drafted settlement agreements. In this case, respondents agreed to be jointly and individually liable for the entire settlement amount. If they did not wish to be jointly and individually liable—and therefore subject to this contribution claim—all they had to do was specify each party's specific financial obligation or state that Velocita alone was responsible for payment of the monetary settlement.

If the Texas contribution scheme disquiets litigation, Texas courts apparently deem that an acceptable cost. Contribution claims often are disquieting by their very nature, sometimes necessitating reopening underlying disputes. And judicial economy prefers resolution of all disputes in a single controversy. But Texas courts have deemed these costs to judicial economy warranted in permitting, for example, a contribution claim by one judgment debtor against another. *Greenspan* v. *Green*, 255 S.W.2d 917 (Tex. Civ. App. – Dallas 1953, writ ref'd n.r.e). In *Greenspan*, the Texas court of appeals upheld a summary judgment by Judge

Sarah Hughes permitting a contribution claim by a judgment co-obligor.

IV. MR. SHERMAN PROPERLY REQUESTED CERTIFICATION.

Mr. Sherman requested certification in his timely petition for rehearing. Normally, this Court might look askance at such a late request, but the timing of the request is understandable in the context of this case. The Texas Supreme Court cases govern this matter, and Mr. Sherman had no idea the court of appeals would consider those cases unworthy of respect due to their age until issuance of the opinion. Under these limited circumstances, Mr. Sherman's request for certification on petition for rehearing should be sufficient.

In any event, there is no requirement—jurisdictional or prudential—as to when a certification request must be made. Even if there were, this Court finds exceptions even to entrenched jurisdictional requirements like the final-judgment rule. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 484-86 (1975).

CONCLUSION

Based on this Court's decision in *Lehman Bros.*, and principles of comity and federalism, the petition for a writ of certiorari should be granted. Alternatively, this Court should vacate the circuit court's decision and remand the case for certification.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT COURT

No. 09-10416

In the Matter of: VELOCITA WORLDWIDE LOGISTICS INC.

Debtor

DANIEL SHERMAN,

Appellant

v.

WILLIAM LAMOTHE; RAJAN SOBHANI; CHRIS BRACK; DANIEL ESTRADA; SCOTT STUDEBAKER; JAMES MICHAEL WALSH; BRANDON ROBINSON; PATRICK STRYER,

Appellees

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 3:08-CV-1516

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Daniel Sherman (the "Trustee"), bankruptcy trustee for Velocita Worldwide Logistics, Inc. ("Velocita"), appeals the district court's judgment affirming the bankruptcy court and declining to imply a right of contribution among defendants who agreed to be jointly and individually liable for a payment as part of the settlement agreement for as state tort action.

I.

The eight appellees (collectively, the "Employees")[1] worked for Velocita, a shipping company. A competing shipping company, Exel Global Logistics ("Exel"), sued Velocita and the Employees for trade secrets violations. After several months of acrimonious litigation, the parties settled the case. In addition to dozens of pages of injunctions against Velocita and individually tailored injunctions against the Employees, the settlement agreement contained a clause requiring $1.85 million payment to Exel. In the payment clause, Velocita and the Employees agreed to be "jointly and individually" liable to pay Exel a $1.85 million. Velocita paid the entire $1.85 million and later entered bankruptcy when it could not meet the demands of its creditors.

[1] Although the underlying suit involved ten employees, only eight are party to the instant appeal.

The Trustee brought suit against the Employees, attempting to force them to pay their pro rata share of the $1.85 million to Velocita. Since the settlement agreement made no mention of contribution, the Trustee relied on an implied contractual right to equitable contribution. Both the bankruptcy court and the district court denied relief. The Trustee timely appealed to this court.

II.

This appeal asks us to consider whether Texas law would imply a right of contribution for a co-obligor of a settlement agreement that paid more than its proportionate share of the settlement.[2] The Trustee relies primarily on *Faires v. Cockrill*, 31 S.W. 190 (Tex. 1895), and *Merchants' National Bank v. McAnulty*, 33 S.W. 963 (Tex. 1896), two century-old Texas cases that recognize an implied right to contribution. The Employees argue that the doctrine announced in these cases has only been applied to sureties and guaranties in the 100 years since it was announced, and caution against expanding its application here.

Under Texas law, a claim for contribution is separate from the underlying tort or contract. "The obligation to contribute is not founded upon contract. . . but upon principles of equity and natural justice which requires [sic] that one shall not be made to bear more than his jut share of a common burden to

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[2] Since the appeal is taken from the district court's summary judgment ruling, our review is *de novo*. *Mongrue v. Monsanto Co.*, 249 F.3d 422, 428 (5th Cir. 2001). We apply the same standards as the district court. *Id.*

the advantage of his co-obligors." *McKelroy v. Hamilton*, 130 S.W. 2d 1114, 1116 (Tex. Civ. App. 1939). The reasoning that underlies the right of contribution is that the co-obligors have made an implied promise to bear the burden equally: "[i]n suits for contribution the right of action is on the *implied promise* for reimbursement and not upon the debt." *Miller v. Miles*, 400 S.W. 2d 4, 7 (Tex. Civ. App. 1966) (emphasis added).

Texas courts have long allowed actions for contribution in guaranty and surety cases even where the right was not set out in the note or contract. Occasionally, Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here. *See, e.g., Employers Cas. Co. v. Transp. Ins. Co.*, 444 S.W.2d 606, 609 (Tex. 1969) ("The general contribution rule is announced in 18 AM. JUR.2d 16, Contribution § 7, in this language: 'The primary requisites of the equitable right to contribution . . . are (1) a situation wherein the parties are in *aequali jure* under some common obligation or burden, and (2) compulsory payment or other discharge, by the party seeking contribution, of more than his fair share of the common obligation or burden.'"). Other cases have defined the right to implied contribution more narrowly. "Under Texas law, there is a very limited right of contribution on a breach of contract claim; that is, a contribution right exists among co-guarantors on a note, or in any situation where there is an implied promise of co-obligors to pay their proportionate shares of a common obligation." *Interstate Contracting Corp. v. City of Dallas*, No.

3:98-CV-2913-M, 2000 WL 1281198 at *4 (N.D. Tex. Sept. 8, 2000)(unpublished), *rev'd on other grounds*, 407 F.3d 708 (5th Cir. 2005).

Notwithstanding the broad language quoted above, Texas courts, to the best of our knowledge, have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts. Because the doctrine has been limited to guaranty and surety agreements, it stands to reason that features of these contracts make them more conducive to equitable contribution than other types of contracts. An examination of the underlying reasons why Texas courts have allowed contribution only in these limited types of agreements bears out this contention.

First, in sureties and guaranties, the subject matter of the contract is (generally) money that has been lent to one party on the binding assurance of another or others. Should the lendee fail to repay, the only contested item is completely fungible and thus easily divisible, making pro rata liability simple to calculate and knowable in advance. Second, contribution accords with the settled expectation of the guarantors: if there are three guarantors, in the absence of contractual provisions to the contrary, each can expect to bear no more than one-third of the amount at issue. The implied promise underlying the right to contribution is implied because it is expected and desired *ex ante*. Disallowing contribution would force each guarantor in a multi-party guaranty to gamble with his potential liability. This would stifle the lending that guaranties

encourage. Third, contribution in the world of guaranties and sureties is both fair and efficient. It speeds the collection process for lenders and ensures that each of the guarantors or sureties is treated equally by default. In sum, surety and guaranty contracts feature both an easily divisible subject matter and an unmistakable underlying intent as to how the parties will bear the risk of default by the lendee.

Assuming *arguendo* that Texas courts would imply a right to contribution in settlement agreements as a general matter, we decline to do so here. The factors that justify the contribution right implied in sureties and guaranties are absent here. First, the subject matter of the settlement agreement involved more than money. Although a $1.85 million payment constituted one part of the agreement, the remainder comprised individually tailored injunctions against the Employees and Velocita.[3] Texas courts have recognized that the general rule of an equally divided pro rata contribution is altered when, for example, co-obligors

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[3] The presence of disparate injunctions, in addition to money, distinguishes the instant case from *Greenspan v. Green*, 255 S.W.2d 917 (Tex. Civ. App. 1953). In *Greenspan*, a bankruptcy trustee was allowed to assert a contribution claim against a co-judgment debtor, even though the "joint judgment [was] without a provision for contribution between the co-debtors." *Id.* at 918. Although the case supports the Trustee's position, it is not entirely analogous because the underlying judgment only involved money, thus making it more similar to a surety or guaranty than the instant settlement agreement. Furthermore, at oral argument, the Trustee specifically disavowed any theory of recovery based on co-debtor status.

shared unequally in the consideration received out of the note, in which case "contribution my be prorated according to the benefits each received." *Dittberner v. Bell*, 558 S.W.2d 527, 534 (Tex. Civ. App. 1977). In this case, the benefits that the individual Employees received from being released from the suit were presumably not equal. Some Employees must have been less involved in the actions that Exel alleged were trade secret violations. The individually tailored injunctions support this contention: LaMothe, for example, faced an injunction that was notably more strict than that faced by the other Employees. Thus, contrary to the Trustee's arguments, implying a right to contribution would necessarily force the district court to open up the underlying settlement to determine an equitable division among the Employees.

The instant facts are in stark contrast to the situation in *Dittberner*, where the court was able to find the amount of consideration received by each party to the promissory note as a percentage of the whole. *Id.* at 534. In cases where the percentage that each party should bear is obvious from the face of the contract or where the parties entered into the arrangement with their potential share of liability allocated by existing law, it is relatively easy for the courts to calculate each party's contribution. The implied promise on which the right of contribution rests is more plausible in such cases. The difficulty of equitably apportioning contribution here weighs against implying the remedy.

Additionally, nothing indicates that contribution would accord with the expectations of the Employees and Velocita. Allowing contribution would imply an eleven-way promise that the Employees and Velocita would almost surely not have made in the circumstances of this case.[4] The Trustee has not pointed to anything in the record indicating that, *ex ante*, the Employees contemplated an arrangement at all analogous to a guaranty.

III.

In conclusion, we do not find the obligations in the instant settlement agreement to be analogous to the obligations in surety and guaranty agreements, the contractual arrangements in which Texas courts have allowed contribution claims against co-obligors. Here, where each party appears to have received a different benefit from the settlement agreement, the shared burden is neither completely fungible nor easily divisible. Accordingly, we affirm the district court's judgment that, on these facts, a right to contribution should not be implied.

AFFIRMED.

HAROLD R. DeMOSS, JR., Circuit Judge, concurs in the judgment only.

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[4] Each of the Employees had a different interest in Velocita; LaMothe, for example, appears to have been a principal in the company. We find it highly unlikely that the more "minor players" signed the agreement with the understanding that they could each be liable for approximately $200,000 of the payment to Exel.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL J. SHERMAN,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:08-CV-1516-K
WILLIAM LaMOTHE, et al.,	§	
	§	
Appellees.	§	

JUDGMENT

The Court having affirmed the order of the United States Bankruptcy Court on the matters appealed in this case, judgment is hereby entered for Appellees. It is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

the bankruptcy court's order of June 9, 2008, granting summary judgment is **affirmed**.

Signed March 26th, 2009.

s/ Ronnie Jacobson
RONNIE JACOBSON
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL J. SHERMAN,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:08-CV-1516-K
WILLIAM LaMOTHE, et al.,	§	
	§	
Appellees.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is an appeal from the bankruptcy court's order granting summary judgment in Adversary No. 06-03533 on June 9, 2008, and Appellees' Motion for Leave to File a Sur-reply (Doc. No. 17). The Court **DENIES** the motion for leave to file a sur-reply and turns to the appeal of the bankruptcy court's order.

Appellant Daniel J. Sherman, Chapter 7 Trustee for Velocita Worldwide Logistics, Inc. ("Velocita"), seeks to recover from Appellees their pro rata share of a $1,850,000 settlement paid by Velocita in an underlying state court action. The bankruptcy court granted summary judgment for Defendants-Appellees, finding no right of contribution or indemnification pursuant to a settlement agreement.

This Court reviews *de novo* the bankruptcy court's decision. *See Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety and Health Admin.*, 280 F.3d 539, 543 (5th Cir. 2002). A bankruptcy court's order granting summary judgment is correct when the pleadings and evidence in the record establish that no genuine issue of material fact exists and the trustee is entitled to summary judgment as a matter of law. *Matter of Criswell*, 102, F.3d 1411, 1414 (5th Cir. 1997). A lower court's grant of summary judgment should be affirmed if the judgment can be supported on any ground. *Harris v. Edward Hyman Co.*, 664 F.2d 943, 945 (5th Cir. 1981).

Appellant raises several issues on appeal: (1) whether the bankruptcy court erred in concluding that a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent contribution claim; (2) whether the Bankruptcy Court erred in concluding that a right of contribution does not arise out of the agreed order entered into under the settlement agreement in this case; (3) whether the Bankruptcy Court erred in concluding that no right of contribution exists in this case because the prior judgment was entered pursuant to a settlement agreement; and (4) whether the Bankruptcy Court erred in its decision on the parties' respective motions for summary judgment.

First, it is important to note that indemnity and contribution are mutually exclusive; one with a right of indemnity has no right of contribution

against the indemnitor. RESTATEMENT (THIRD) OF TORTS § 23(c). In the bankruptcy court, Appellant pursued an indemnity claim that has been dropped here in favor of solely contribution.

There is no common law right to contribution among joint tortfeasors in Texas. *Iowa Mfg. Co. v. Weisman Equip. Co.*, 667 S.W.2d 209, 211 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Bradshaw v. Baylor University*, 52 S.W.2d 1094, 1101 (Tex. Civ. App. 1932)). Contribution thus must be statutorily created or based on a contract among joint tortfeasors, as Appellant alleges here. The underlying settlement agreement and agreed final judgment settled tort claims for misappropriation, tortuous interference with contract and prospective business relationships, unfair competition, violations of various statutory provisions, and a host of other claims. The agreed final judgment notes the defendants are joint and severally liable.

By statute, each defendant who is jointly and severally liable is liable for the damages recoverable by the claimant pursuant to statute in proportion to the respective percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.015. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is required its percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with whom its (*sic*) is jointly and severally liable to the extent that the other defendant has not paid the proportion of those damages required by

that other defendant's percentage of responsibility. *Id.*

Yet there is no statutory right to contribution among defendants who enter into a joint settlement agreement that resolves all of a plaintiff's claims. *Southwestern Bell Tel. Co. v. Gen. Cable Indus., Inc.,* 966 S.W.2d 166, 171 (Tex. App.—El Paso 1998, pet. denied). The statute does not *create* a right of contribution in a settling party, but it also does not *prohibit* a contractual contribution claim. *Id.* In *Southwestern Bell,* the settlement agreement specifically provided for a "right to assert the claim for contribution or indemnity"—that is, it explicitly created a contractual claim for contribution between settling defendants. *Id.* at 168. "Although a settling defendant does not have a statutorily created right to seek contribution, neither of the [statutory provisions] prohibited the parties from creating a right to contribution by settlement agreement." *Id.* at 171.

Because there is no statutory right of contribution among settling defendants and no such provision was written into the contract, Appellant would have the Court imply one in the contract. "Under Texas law, there is a very limited right of contribution on a breach of contract claim that is, a contribution right exists among co-guarantors on a note, or in any situation where there is an implied promise of co-obligors to pay their proportionate shares of a common obligation." *Interstate Contracting Corp. v. City of Dallas,* No. 3:98-CV-2913-M, 2000 WL 1281198, at *4 (N.D. Tex. Sept. 8,

2000) (Lynn, J.), *rev'd on other grounds,* 407 F.3d 708 (5th Cir. 2000).

Texas public policy favors settlements to effectuate the efficient administration of justice. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). Appellant would have the Court open up a state court's agreed judgment, signed on May 25, 2004, in an ultimately futile attempt to determine the pro rata liability of ten individual defendants. Such an action would frustrate Texas public policy of encouraging settlement. Settling tortfeasors may agree among themselves as to their respective responsibility for a plaintiff's damages, *e.g., Southwestern Bell,* 966, S.W.2d at 171, rather than ask a court five years later to do to the work for them.

Here, there is no mention of contribution (or indemnity) between the Defendants in the settlement agreement. The settling parties were free to negotiate a provision providing for contribution. They did not include such a provision, and the Court is unwilling to imply one for them. The bankruptcy court was thus correct in granting Defendants-Appellees' motion for summary judgment, finding no basis in law or in equity for a contribution claim.

After review of the bankruptcy court record, the briefs of the parties, and the applicable law, the Court concludes that the bankruptcy court's determination was correct. The decision of the bankruptcy court is **AFFIRMED**. The Clerk is

hereby directed to prepare, sign and enter the judgment pursuant to Bankruptcy Rule 8016(a).

SO ORDERED.

March 26th, 2009.

s/ED KINKEADE
UNITED STATES DISTRICT JUDGE

[NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 9, 2008

s/Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
Velocita Worldwide	§	
Logistics, Inc.	§	
	§	
Debtor.	§	Case No.
	§	05-86083-HDH-7
	§	

Daniel J. Sherman,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
William LaMothe,	§	
et al.,	§	
	§	
Defendants.	§	Adversary No.
	§	06-03533

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Came before the Court for hearing on June 4, 2008, the Defendants' Motion for Summary Judgment ("Defendants' Motion") and Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion").

Summary Judgment Standard

Summary judgment is proper if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issues of material fact, and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial burden of articulating the basis for it motion and identifying evidence, which shows that there is no

genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Material issues are those that could affect the outcome of the action. *Wyatt v. Hunt Plywood, Co. Inc.*, 297 F.3d 405, 409 (5th Cir. 2002).

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1046-47 (5th Cir. 1996). The burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial. *Epps. v. NCNB Texas Nat'l Bank*, 838 F.Supp. 296, 299 (N.D. Tex. 1993), *aff'd* 7 F.3d 44 (5th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The nonmovant's burden may not be satisfied by conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, metaphysical doubts as to the facts, or a mere scintilla of evidence; and legalistic arguments are not adequate substitutes for specific facts show that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586-87; *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993); *Wallace*, 80 F.3d at 1047.

The court must draw inferences in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 255. However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), revised on other grounds upon denial of reh'g, 70 F.3d 26 (1995); *see also Wallace*, 80 F.3d at 1048; *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996). The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum*, 66 F.3d at 92. Once a summary judgment motion is made and properly supported, the nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

Application To the Present Motions

Based on the record made before the Court, there are no material fact issues in dispute, and the Court finds that summary judgment should be granted as a matter of law as to Defendants' Motion and denied as a matter of law as to Plaintiff's Motion.

The Defendants' Motion involves the right of contribution and indemnification among parties to an agreed judgment entered in the 192nd District

Court of Dallas County, Texas, pursuant to a settlement agreement. With respect to the right of contribution, under Texas law, a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent contribution claim. *Beech Aircraft Corp. v. Jinkins,* 739 S.W.2d 10, 21 (Tex. 1987). Therefore, a right of contribution does not arise out of the agreed order entered into under the settlement agreement between the Plaintiff and Defendants in this case. As to the right of indemnification, under Texas law, common law indemnity has been abolished, except where a party is vicariously liable. *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.,* 751 S.W.2d 179 (Tex. 1988); *Bonniwell v. Beech Aircraft Corp.,* 663 S.W.2d 816 (Tex. 1984). And a right of indemnification exists against a party who is vicariously liable only when there has been a judicial determination or admission that such party is liable to the claimant. *Humana Hosp. v. American Medical Systems, Inc.,* 785 S.W.2d 144 (Tex. 1990). Since there has been no finding in this case that the Defendants are liable to the Plaintiff, no right of indemnification arises.

The Plaintiff's Motion also involves the right of contribution and indemnification. As previously mentioned, no right of contribution or indemnification exists in this case since the prior judgment was entered pursuant to a settlement agreement.

Based on the foregoing, it is

ORDERED that the Defendants' Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

DER ###

[Case No. 09-10146 Document: 00511170272
Date Filed: 07/12/2010]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10416

In the Matter of: VELOCITA WORLDWIDE LOGISTICS, INC.
Debtor

DANIEL SHERMAN,
Appellant

v.

WILLIAM LAMOTHE; RAJAN SOBHANI; CHRIS BRACK; DANIEL ESTRADA; SCOTT STUDEBAKER; JAMES MICHAEL WALSH; BRANDON ROBINSON; PATRICK STRYER,
Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:
s/Emilio M. Garza
United States Circuit Judge